Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

DAVID S. PORTER and CAROL A. PORTER,

Petitioners,

v.

BANKNORTH, N.A., F.S.B. DEVELOPMENT CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a state, acting through its judiciary, from "depriv[ing] a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless [he] is . . . afforded . . . some real opportunity to protect it." *Brinkerhoff-Farris Co. v. Hill*, 281 US 673, 680 (1930). This case involves a series of judicial actions and inactions, many made without explanation and all in plain conflict with controlling precedent and applicable rules of practice and procedure, which together deprived Petitioners of any real opportunity to enforce their rights under federal credit and banking and state consumer protection law.

1. Whether the state court's procedural rulings in this litigation were so contrary to controlling precedent that they deprived petitioners of their rights under the federal Equal Credit Opportunity Act and Bank Holding Company Act?

2. Whether the state court's repeated deprivation of the Porters' rights to present their case and be heard in support of their claims was so fundamentally unfair, that it amounted to a denial of due process, and resulted in a manifestly unjust and unconscionable judgment?

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OPINIONS BELOW

The opinion of the Appeals Court of Massachusetts (Pet. App. 1a) is also unreported. The opinion of the Massachusetts Superior Court for the County of Middlesex denying petitioners' cross-motion for summary judgment on claims under Federal credit statutes (Pet. App. 9a) is unreported. The trial court issued a Corrected Judgment. (Pet. App. 6a).

STATEMENT OF JURISDICTION

The judgment of the Massachusetts Appeals Court was entered on September 10, 2003. On October 29, 2003, the Supreme Judicial Court of Massachusetts denied Petitioners' Application For Further Appellate Review. (Pet. App. 15a). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

This case involves the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691, *et seq.*, enabling regulation ("Regulation B"), 12 C.F.R. §§ 202.1, *et seq.* (Pet. App. 17a-21a), the Anti-Tying Provisions of the Bank Holding Company Act ("BHCA"), 12 U.S.C. §§ 1972(1)(C), (D) *et seq.* (Pet. App. 16a), and 940 CMR § 3.16 (4).

STATEMENT OF THE CASE

This case involves a series of judicial actions and inactions, many made without explanation and all in plain conflict with controlling precedent and applicable rules of practice and procedure, which together deprived Petitioners David S. Porter

("Mr. Porter"), Carol A. Porter ("Mrs. Porter") (collectively "the Porters") of any real opportunity to establish violations by the Respondents Bank North, N.A. ("Bank")[1] and its wholly-owned subsidiary, F.S.B. Development Corp. ("FSBDC") (collectively "the Bank") under federal credit and banking law, which constitute per se violations of the Massachusetts Consumer Protection Act, M.G.L. c.93A, §§ 9, 11.

Mr. Porter and the Bank were partners in PLLP, a real estate development partnership formed to acquire and develop property in Needham, Massachusetts (the "Project"). The parties agreed that Mr. Porter would manage the Project, and that funding for the Project would be provided by the Bank and FSBDC. The Bank selected Mr. Porter as its first joint venture partner based upon his successful development record with the Bank. The senior Bank officer responsible for dealing with Mr. Porter was a longtime personal friend of the Porters and had administered the Bank's previous loans to Mr. Porter.

At the closing to acquire the Project property in October 1986, (a) Mr. Porter and FSBDC entered into a limited partnership agreement, (b) Mr. and Mrs. Porter executed a $275,000 note, secured by a mortgage on their home and representing one half of the equity in PLLP, and (c) Mr. Porter, both as General Partner and individually, executed a $2 million note, secured by a mortgage on partnership property. Mr. Porter's liability under the $2 million note was limited by its terms to 50% of any deficiency. Mrs. Porter was not liable under the $2 million note.

Shortly after the closing, the Bank told Mr. Porter that the October 1986 loan documents, which it had prepared, contained "technical deficiencies" that needed to be corrected. The Bank

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1. BankNorth N.A. is the successor-in-interest to MetroWest Bank, which was Framingham Savings Bank before it changed its name.

assured the Porters that the new credit documents would not change the basis of the relationship between the Bank, FSBDC and the Porters or increase the Porters' financial obligations.

In March 1987, the Bank, as a condition for moving forward with the Project, required Mr. Porter to sign new credit documents. Mr. Porter, as General Partner of PLLP, signed a $550,000 note payable to FSBDC ("$550K Note") secured by a new mortgage on the Partnership property ("550K Mortgage"). The Bank also required both Mr. *and Mrs. Porter* to sign a Guaranty that they later learned made them personally liable under both the $2 million note in favor of the Bank and the $550K note in favor of FSBDC. The Porters did so in reliance on the Bank's repeated assurances that the new credit documents did not change the basis of the relationship between the Bank, FSBDC and the Porters or increase the Porters' financial obligations.

Contrary to such representations and assurances, the March 1987 credit documents – copies of which the Bank withheld from the Porters until after suit was commenced – made numerous substantive changes to the October 1 agreements, including:

(a) improperly converting FSBDC's capital contribution into partnership debt;

(b) allowing FSBDC to charge interest on its capital contribution in violation of the partnership agreement;

(c) conferring on FSBDC the right to exercise as a lender precisely the control over the management of the Partnership that it expressly gave up when it agreed to be limited partner;

(d) increasing Mr. Porter's personal liability by requiring that he guarantee the full $2 million

note even though the note by its terms limited Mr. Porter's liability to one-half of any deficiency;

(e) rendering Mrs. Porter liable for the full amount of $2 million note and half of the $550K Note, despite the fact that she was a stranger to the Partnership and received *no consideration* for her guarantee. Mrs. Porter was required to sign because she was married to Mr. Porter.

Mr. Porter, concerned about the softening real estate market and increased costs of construction during 1987, decided to build only one house at a time, not four as originally planned. In mid 1987, a senior Bank officer, also an officer of FSBDC, demanded that Mr. Porter begin construction on three homes. Mr. Porter warned that the Partnership did not have adequate funds to build three homes at the same time. The Bank assured Mr. Porter that it would timely provide any additional needed funds.

Construction funds ran low in early 1988, slowing the Project and impairing the Partnership's ability to pre-sell the partially completed homes. The Bank was reluctant to loan additional money to the Partnership until one home sold, despite its previous promises and assurances. Throughout the life of the Partnership, FSB and FSBDC each unilaterally paid themselves interest on their loans from partnership funds over Mr. Porters' objections.

In June 1988, the Bank finally refinanced the Project, paying off the $2 million note and discharging the mortgage, and replacing them with a new $2.9 million note and mortgage. Without notice to the Porters,[2] FSBDC subordinated the $550K Note and related mortgage on the Partnership property to the new $2.9 million note and mortgage. By such unilateral and

2. Like the March 17 documents, the Bank failed to furnish a copy of the subordination agreement to the Porters until well after suit commenced.

undisclosed subordination, FSBDC (a) violated express terms of the Guaranty; (b) breached its duty of good faith and loyalty to Mr. Porter and the Partnership; and (c) materially increased Mrs. Porter's financial exposure without consideration.

By late 1988, the Bank was subject to FDIC control and stopped making loan advances. Coupled with the falling real estate market, the Project failed and the partnership property was sold at a foreclosure sale.

Had FSBDC not subordinated its mortgage, the $550,000 note as secured by a mortgage on the Porters' home (the only remaining obligation under the Guaranty) would have been discharged from proceeds of the foreclosure sale of partnership property, as they far exceeded the amount needed to pay off the $550,000 note.

A. Proceedings In The Superior Court of Massachusetts

In June 1990, the Porters sued the Bank in the Superior Court of Massachusetts alleging wrongful conduct by the Bank in connection with the formation and operation of the Partnership and the execution of March 1987 credit documents. Count Ten alleged violations of M.G.L. c.93A. It specifically challenged as unfair and deceptive the Bank's insistence in March 1987 that the Porters sign new credit documents as new loan conditions.

The Porters further alleged that FSBDC used the terms of the $550,000 note to unfairly exercise control over the Partnership by, among other things, unilaterally deducting interest on the $550,000 note from the Partnership's account (which deprived the Partnership of crucial working capital) and insisting that Mr. Porter build three houses simultaneously against his advice.

The Bank answered and interposed counterclaims seeking damages under notes, personal guarantees, and mortgage signed by the Porters in March 1987 and June 1988. The Porters'

then-attorney, Edward Collins ("Mr. Collins"), filed an answer to the Banks' counterclaims asserting affirmative defenses, including lack and/or failure of consideration and fraud in the inducement.

While the Bank conducted extensive discovery under the Tracking Order, Mr. Collins failed to conduct any discovery until the week prior to the discovery deadline. In mid-April 1991, the Porters retained new counsel based on Mr. Collins' failure to timely conduct discovery, account for a $70,000 retainer, and because he had been sanctioned by the Court on several occasions while representing the Porters.

On May 3, 1991, Mrs. Porter informed Mr. Collins by telephone that he had been discharged and that new counsel had been retained. On Monday, May 6, 1991, the Porters sent Mr. Collins a letter confirming the May 3 phone call and asking that he immediately file a Notice of Withdrawal so new counsel could enter his appearance. The Porters and new counsel left telephone messages with Mr. Collins' office on May 6, 7, and 8 asking him to transfer the case file and file a notice of withdrawal.

On May 8, 1991, new counsel left a message with the Bank's counsel informing him that he was filing an appearance that day. On that day, *six days* after being formally discharged and prior to receiving any discovery from the Bank, Mr. Collins attended a final pre-trial conference in Middlesex Superior Court. He not only failed to inform the court of his discharge but agreed, without the Porter's authorization or approval, to a Joint Pre-Trial Memorandum, prepared by the Bank's counsel, which severely compromised the Porters' rights and effected the entire future course of the litigation. Only after the fact did the Porters' new counsel learn that a pre-trial conference had been held, attended by Mr. Collins, and that trial had been set for August 7, 1991.

At the pre-trial conference on May 8, the Bank filed a motion to file an Amended Counterclaim, which Mr. Collins did not oppose. On June 10, 1991, the Porters and PLLP answered the Bank's amended counterclaim raising affirmative defenses, including illegal novation, lack and failure of consideration, and fraud in the inducement, each of which, if proven, would have barred recovery by the Bank on the loan and Guaranty.[3]

Despite Mrs. Porter's request in early May 1991 that Mr. Collins immediately forward all files to the Porters' new counsel, he neglected to do so until in late June 1991. Realizing, upon reviewing the file, that Mr. Collins had failed to conduct adequate discovery, the Porters' new counsel attempted without success to enlarge the time for discovery and to continue the trial.

In late June 1991, the Bank moved for partial summary judgment on counterclaims asserting liability of the Porters for deficiencies after foreclosure under a $2.9 million note to the Partnership (Count I), the $550K note (Count II), and the Porters' Guaranty (Count III). The Porters opposed the Bank's motion, supported by their own affidavits and references to their Verified Complaint. The Superior Court took no action on the Bank's motion.

In August 1991, Mr. Porter petitioned for bankruptcy protection. The Bank immediately moved to stay all state court actions while Mr. Porter was in bankruptcy.

In September 1992, when the bankruptcy was dismissed, the Bank renewed its motion for partial summary judgment. On October 19, 1992, two days before the hearing on the Bank's motion, the Porters filed supplementary affidavits and a

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3. Incredibly, the Superior Court subsequently barred the Porters from raising several of the affirmative defenses raised in their Answer to the Bank's amended counterclaim because they had not been included in the Joint Pre-Trial Memorandum that pre-dated their Answer.

memorandum of law opposing the Bank's motion and cross moved for summary judgment against the Bank under Chapter 93A.

On October 20, 1992, the Bank moved to strike the Porters' supplemental opposition to summary judgment. The Superior Court took no action on the Bank's motion to strike the opposition.

On October 22, 1992, the day after the summary judgment hearing, the Bank moved to strike the Porters' cross-motion for summary judgment, which the Superior Court purportedly allowed on November 6, 1992.

In December 1992, the Porters moved for leave to amend the Chapter 93A count of their complaint to assert that the credit documents executed by Mrs. Porter in March 1987 – challenged in the original complaint as unfair and deceptive, and the subject of the affirmative defenses of failure of consideration and novation in the Porters' answer to the Bank's amended counterclaim – violated federal credit law, a per se violation of Chapter 93A. The Porters specifically claimed in their proposed Amended Complaint that the Bank violated (a) the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, *et seq.*, and enabling regulation, 12 C.F.R. §§ 202.1, *et seq.*) ("ECOA") by requiring Mrs. Porter to guaranty the partnership's debt when the Bank considered Mr. Porter creditworthy, and (b) the anti-tying provision of the Bank Holding Company Act ("BHCA"), 12 U.S.C. §§ 1972(1)(C), (D) *et seq.*), by conditioning the Bank's performance under the original October 1986 partnership and loan agreements between Framingham Savings Bank, FSBDC, Mr. Porter and PLLP on the Porters' agreement to furnish additional consideration in the form of the $550,000 note and mortgage and personal guaranty.

The motion to amend was based on credit documents that the Bank had failed to provide to the Porters until after suit was commenced. It was filed as soon as Mr. Porter's motion to

dismiss the bankruptcy was allowed over the Bank's opposition. The Bank opposed the Porters' motion but made no showing of prejudice.

At the same time, the Porters also moved to vacate the Pre-Trial Memorandum based on the undisputed fact that Mr. Collins attended the pre-trial conference a week after he had been discharged, a fact which Mr. Porter had documented more than a year earlier in a sworn affidavit.

On December 8, 1992, the Superior Court, without hearing and without explanation, denied both the motion to amend and motion to vacate.

In April 1993, the Superior Court allowed the Banks' motion for partial summary judgment, finding "allegations of fraud [contained in the Porters' affidavits and Verified Complaint] insufficient" to satisfy the Porters' burden to allege fraud by specific facts. Pet. App. 14a. The court did so notwithstanding a statement earlier in its opinion that the affidavits raised a material issue of fact whether the Bank obtained the Porters' signatures on the Guaranty by fraud.

At a final pretrial conference in October 1993 the Porters again moved unsuccessfully to vacate the Pre-Trial memorandum. In December 1993, the court entered a procedural order confirming that the Pre-Trial Memorandum governed the issues to be litigated at trial. Prior to the beginning of the trial, the Porters once again asked the Superior Court to consider their federal claims. The court agreed to hold a hearing on the issue, but later determined that the claims could not be considered because they were not included in the Pre-Trial Memorandum.

The Porters' claims were tried to a jury in March 1994, with the Superior Court expressly reserving the Porters' claims under Chapter 93A, including those challenging provisions of the March 1987 credit documents as unconscionable and alleging unfairness in the subordination by FSBDC of the

$550,000 note and mortgage. The special question posed to the jury on the common law fraud count asked whether the Porters had proved that the Bank made any "*fraudulent* misrepresentations," thus lumping together under a single question five of the six elements the Superior Court had instructed the jury the Porters were required to establish in order to prove fraudulent misrepresentation. The jury returned a verdict in favor of the Bank on the issues of fraudulent misrepresentations and breach of contract.[4]

On May 11, 1994, the Superior Court entered a Corrected Final Judgment in favor of the Bank on all counts of the Porters' complaint and awarded the Bank damages on the counterclaims. The court made no finding of facts with respect to the Porters' Chapter 93A claims, nor did it state separately its conclusions of law with respect to such claims as required under Mass. R. Civ. P. 52(a). It simply ordered entry of judgment on such claims based "[u]pon the jury's verdict. . . ." Pet. App. 6a.

B. Proceedings In The Appeals Court Of Massachusetts

The Porters appealed to the Massachusetts Appeals Court arguing, among other things, that the Superior Court had erred in failing to rule on the Porters' Chapter 93A claims, refusing to permit amendment of their complaint to assert their federal claims under the ECOA and BHCA, both before and during trial, and requesting entry of judgment as a matter of law on such federal claims.

By Memorandum and Order dated September 10, 2003, the Appeals Court affirmed the judgment of the Superior Court in its entirety, relying in large part on specious arguments advanced by the Bank in its brief. Pet. App. 1a-5a. The Appeals Court held that the Porters' federal claims under the ECOA and BHCA were "correctly ruled to be not properly part of the case, either as independent causes of action or as support for the 93A claims." Pet. App. 2a.

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4. But for the Trial Court's repeated pre-trial and mid-trial admonitions, which shaped the Porters' trial presentation, they could have presented evidence sufficient to support a finding of fraud against the Bank.

C. Proceedings In The Supreme Judicial Court of Massachusetts

The Porters sought further review in the Supreme Judicial Court of Massachusetts of the rulings of the Superior Court and Appeals Court. By Order dated October 29, 2003, the Court denied petitioners' Application For Further Appellate Review without comment. Pet. App. 15a.

REASONS FOR GRANTING THE PETITION

A. The Porters Were Deprived Of Their Rights Under The Federal Equal Credit Opportunity Act And Bank Holding Company Act By The State Court's Novel Application Of Its Procedural Rules.

1. This Court has the power to determine whether a state court has improperly by-passed a federal right under a form of local procedure.

This Court has jurisdiction to hear petitioners' appeal because the state courts' actions and inactions, many made without explanation and all in plain conflict with controlling precedent and applicable rules of practice and procedure, together deprived Petitioners of any real opportunity to enforce their rights under federal credit and banking law.

The Porters' federal claims were presented to the Massachusetts courts, which were apprised of the nature and substance of such claims. *Ellis v. Dixon*, 349 U.S. 458, 463 (1955). This Court is not prevented by the "state court's determination as to the sufficiency of the pleadings asserting a federal right," because it has the power to determine *de novo* "whether the state court has by-passed the federal right under forms of local procedure." *Id.* "The issue of whether a federal question was sufficiently and properly raised in the state courts is ultimately a federal question, as to which this Court is not bound by the decision of the state court." *Street v. New York*,

394 U.S. 576, 583 (1969); *accord*, *Howlett v. Rose*, 496 U.S. 356, 366 (1990).

2. The refusal by the Massachusetts court to hear the Porters' federal claims was outcome determinative.

A state ground is not adequate to preclude review in this Court where, as here, a decision on the federal issue would change the outcome of the case. *See Chicago B. Q. Ry. v. Drainage Comm'rs*, 200 U.S. 561, 580 (1906).

When a loan applicant qualifies under a lender's standards of creditworthiness and the loan is granted based on the applicant's willingness and ability to repay, the lender cannot require the spouse of the applicant to sign any credit documents relating to the loan transaction. *See* 12 C.F.R. § 202.7(d)(1). To do so violates the ECOA and Regulation B. *See United States v. Consumer Fin. Corp.*, 816 F.2d 487, 491 (9th Cir. 1982); *Anderson v. United Finance*, 666 F.2d 1274, 1277 (9th Cir. 1982); *Shammas v. New England Merchants Nat'l Bank*, 1990 WL 354452 (D. Mass. 1990), *quoting Anderson*, 666 F.2d 1277("'Where a spouse's guaranty is required when an individual is creditworthy on his or her own, the spouse's guarantee is illegal.'").

At trial, the Bank's Vice President admitted that the Bank considered Mr. Porter to be creditworthy in March 1987 when the Bank required Mrs. Porter to sign the Guaranty, note and mortgage securing the Bank's loans to Mr. Porter and the Partnership. Such testimony was sufficient to establish that the March 1987 credit documents violated the ECOA and Regulation B as a matter of law.

Likewise, a violation of the anti-tying provision of the BHCA by the Bank was established at trial as a matter of law. The provision provides in pertinent part that a "bank shall not extend credit, furnish any service or vary the consideration for any of the foregoing on the condition or requirement that the

customer provide some additional credit, property or service to such bank." 12 U.S.C. §§ 1972(1)(C), (D). By requiring the Porters to provide personal guarantees in March 1987, the Bank conditioned the extension of credit on the Porters' providing additional security.

Because the Bank's violations of the ECOA and BCHA were established as a matter of law, the state court, had it considered such claims, would have entered a judgment different from the one resting upon some ground of local or general law, thus providing a basis for jurisdiction in this Court. *See Chicago B. Q. Ry.*, 200 U.S. at 580.

The claim by the petitioners of Federal rights under the ECOA and BHCA "went to the very root of the case. . . ." *Id.*, 200 U.S. at 581. If the claimed violations of federal credit and banking law were valid, then judgment should have entered for the Porters, for the "supreme law of land must always control." *Id.* "Therefore, a failure to recognize such Federal right . . . , and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right . . . had been expressly denied." *Id.*

3. The Porters' federal rights were thwarted by the Massachusetts court's application of local procedural rules with pointless severity.

The Superior Court based its judgment, and the Massachusetts Appeals Court affirmed, on the basis of the asserted failure of the Porters to raise violation of the ECOA and BCHA as a basis for the Bank's liability under Chapter 93A in their original complaint and in the Pre-Trial Memorandum.

A review of the record, and of prior Massachusetts precedent, establish that the state court's refusal to allow amendment by the petitioners to claim violations of the ECOA and BCHA were the result of application of the rule governing

amendment of pleadings with "pointless severity" and completely at odds with its prior decisions favoring amendment. *N.A.A.C.P. v. Alabama ex. rel. Flowers*, 377 U.S. 288, 297 (1958).

Like its federal counterpart, Rule 15(a) of the Massachusetts Rules of Civil Procedure provides that a party's request for leave of court to amend its pleading "shall be freely given when justice so requires. . . ." "The decision whether to grant a motion to amend is within the discretion of the judge, but leave should be granted unless there are good reasons for denying the motion." *Mathis v. Massachusetts Electric Co.*, 409 Mass. 256, 264 (1991), *citing Goulet v. Whittin Mach. Works, Inc.*, 399 Mass. 547, 549 (1987); *Castelluci v. United States Fidel. & Guar. Co.*, 372 Mass. 288, 289-290 (1977); *see also Hamed v. Fadili*, 408 Mass. 100, 105 (1990) (Rule 15(a) "eliminated the once broad discretionary authority of the judge to deny a motion to amend a pleading"). "Such reasons include 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'" *Mathis*, 409 Mass. at 264, *quoting Castelluci*, 372 Mass. at 290, *quoting Foman v. Davis*, 371 U.S. 178, 182 (1962).

Measured against these standards, there is no question that the Superior Court abused its discretion in denying the Porters' motion for leave to file an amended complaint, and that the Appeals Court's decision to affirm was so completely at odds with binding precedent as to establish that the state courts bypassed the Porters' federal claims by applying Rule 15 with "pointless severity."

The Superior Court's failure to provide *any* reason for its denial, in and of itself, should have provided the Appeals Court with sufficient grounds for reversal. *See, e.g.*, *Foman*, 371 U.S. at 182; *Hayes v. New England Millwork Dist., Inc.*, 602 F.2d 15, 20 (1st Cir. 1979); *Quimby v. Zoning Bd of App. of Arlington*,

19 Mass. App. Ct. 1005, 1007 (1985) (reversing judgment and remanding to Superior Court for reconsideration of the denial of the motion to amend where denial simply bore notation "After hearing motion denied"). Where, as here, justification for the judge's denial is not readily apparent from the record, a "statement of reasons or finding of fact [is] . . . required . . . to demonstrate adequate justification for a judge's action in denying a motion to amend a pleading." *Goulet*, 399 Mass. at 550, *citing Castellucci*, 372 Mass. at 291 n.2. "An 'outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the [Massachusetts] Rules.'" *Castellucci*, 372 Mass. at 289, *quoting Foman*, 371 U.S. at 182.

In the face of such precedent, for the Massachusetts Appeals Court to have found *no* abuse of discretion was inconsistent with controlling Supreme Judicial Court precedent, and hence eliminated an otherwise adequate state ground for the judgment in favor of the respondent. *Young v. Ragen*, 337 U.S. 235 (1949).

"It is well-settled that prejudice to the non-moving party is the touchstone for the denial of an amendment." *Goulet,* 399 Mass. at 550 n.3. "While 'undue delay' may justify a denial, [the Massachusetts] courts ha[ve] usually required some factor other than delay, such as imminence of trial or the plaintiff's attempting to introduce a totally new theory of liability." *Goulet*, 399 Mass. at 552. Neither was the case here.

The amended complaint sought to add a count for violation of the ECOA and BHCA. Amendment of the complaint to add such claims would have been "little more than a mere formality" because the plaintiffs' original complaint "implicitly alleged" breach of Chapter 93A as a result of the Bank's violation of federal credit and banking law by requiring Mrs. Porter to personally guarantee her husband's obligations to the Bank and by conditioning existing loans on the giving of additional security by the Porters. The new count merely added theories of liability arising out of the same course of dealing as pled in the original complaint. *Goulet*, 399 Mass. at 551; *see Guardianship*

of Hurley, 394 Mass. 554 (1985) (amendment which states additional cause of action arising from same underlying facts is proper).

The Bank's claim of prejudice was specious. The Bank could not possibly have suffered prejudice, since no additional discovery was required to prove the Porters' federal claims. They were based on documents and information solely within the Bank's possession and on law that the Bank was required to follow in making all loans. For the Superior Court to deny amendment in such circumstances is simply inexplicable and cannot be justified under controlling precedent.

The timing of the Porters' motion for leave to amend did not prejudice the Bank in any way.[5] Trial, although scheduled for January 1992, a month after the motion to amend was filed, did not ultimately take place until March 1994. "Clearly, any prejudice that might have existed when trial was imminent had disappeared once the trial date had been continued." *Goulet*, 399 Mass. at 552.

"The plaintiffs here were not attempting to introduce or substitute a 'markedly' different theory of liability, nor was trial . . . imminent. The record shows no indication of bad faith, dilatory tactics or other justification for the motion judge's denial of the plaintiffs' motion for leave to amend." *Id.* Indeed, the *Bank* was responsible for all delays, having moved to stay all state proceedings immediately after Mr. Porter filed for bankruptcy and then opposing Mr. Porter's motion to dismiss the bankruptcy. Under *Goulet*, "the judge should have allowed to plaintiffs to amend their complaint. . . ." *Id.*

As in *Goulet*, the "present problem was exacerbated by the trial judge's mistaken belief that [s]he had little discretion to

5. The Banks arguments to the Court alleging *undue delay* were misleading and made in bad faith. The Porters could not move to amend between August 1991, when the Bank moved to stay all state court actions while Mr. Porter was in bankruptcy, until September 1992, when the bankruptcy was dismissed over the Banks's objection.

allow" the Porters to "amend to conform to the evidence if the evidence warranted such a motion." *Id.* Despite the fact that the documents on which the Porters based their ECOA and BHCA claims under Chapter 93A were in evidence, and that the Bank's Vice President testified that the Bank relied solely on Mr. Porter's creditworthiness in making loans to the partnership, the Superior Court made it clear it would not allow such an amendment. Here, as in *Goulet*, the Superior Court not only had the power to grant the Porters' motion, it was *obligated* to allow amendment in view of the evidence presented. *Id.* at 554.

The decision by the Massachusetts Appeals Court finding no abuse of discretion in denial of the petitioners' motions to amend, both before and during trial, was inconsistent with prior determinations of the state's highest court. *See Young*, 337 U.S. 235 (1949). The decisions were unreasonable, arbitrary, and had the clear affect of allowing the state court to avoid a decision on the Porters' federal claims under the ECOA and BCHA, which allowed the Bank to avoid liability. *Vendella R. Co. v. State of Indiana ex. rel. City of South Bend*, 207 U.S. 359 (1907). Denial of the right to amend in such circumstances served no legitimate state purpose. In taking a strict interpretation of a rule which, by its terms, favored liberal amendment, the state was so picayune in enforcing a procedural requirement that form was stressed over any possible state interest in strict enforcement.

"The consideration of asserted [federal] rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 297 (1964). "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal . . . rights." *N.A.A.C.P. v. Alabama*, 357 U.S. at 457-458.

As in the *N.A.A.C.P.* case, "[p]aying full respect to the state court's opinion, it seems . . . crystal clear that the rule invoked

by it cannot be deemed reasonably applicable to this case." Because the nonfederal ground relied upon below was inadequate to support the judgment, this case must be remanded to the Supreme Judicial Court of Massachusetts for a decision on the merits of the petitioners' federal claims. *N.A.A.C.P.*, 377 U.S. at 302.

The record also conclusively establishes that the refusal by the Superior Court and Appeals Court to vacate the Pre-Trial Memorandum, which was signed by Mr. Collins at a time when he had absolutely no authority to do so, was in clear conflict with controlling precedent and prevented the Porters from litigating their federal claims and defenses.

By agreeing to a one-sided pre-trial memorandum, Mr. Collins severely prejudiced the Porters' substantive rights at a time when he lacked any authority to represent the Porters. *See Lawrence Savings Bank v. Garabedian*, 49 Mass. App. Ct. 157, 163 (2000), *citing Commonwealth v. White*, 429 Mass. 258, 264 (1999)(an important factor in determining whether trial court abused its discretion is the "importance of the rights lost"). As a result, the memorandum should not have been binding on the Porters and should have been vacated. *See City of Medford v. Corbett*, 302 Mass. 573, 574-576 (1939) (agreement for judgment could be vacated where proof by credible evidence that attorney who signed the agreement did not have authority to do so); *Precious v. O'Rourke*, 270 Mass. 305, 308-309 (1930) (same).

Any question about whether Mr. Collins had authority to act on the Porters' behalf is eliminated by Bank counsel's knowledge that there was, as of May 8, 1991, a serious question as to whether Mr. Collins was still representing the Porters. *See Malave v. Carney Hosp.*, 170 F.3d 217, 221 n.6 (1st Cir. 1999) (where opposing party was on notice of an attorney's limited authority, lack of justifiable reliance on attorney's representations prevented attorney from binding client in signing settlement agreement).

Binding the Porters to a pre-trial memorandum signed by counsel that they had already discharged violated public policy. It is well established under Massachusetts law that there is "a strong public policy to assure one in need of legal help freedom to select an attorney, to change attorneys, and to seek and obtain advice as to the competency and suitability of any attorney for the particular need of the client." *Walsh v. O'Neil*, 350 Mass. 586, 590 (1966). "The right of a client to [change lawyers] has not much value if the client is put at risk" of being bound by the conduct of an attorney who has already been discharged. *Salem Realty Co. v. Matera*, 10 Mass. App. Ct. 571, 575 (1980). The Porters played no part in, and were completely unaware of, the fact that Mr. Collins had signed the Pre-Trial Memorandum after he had been discharged.

Under the circumstances, the Porters were entitled to have the joint pre-trial memorandum vacated. For the Superior Court to deny the Porters' motion to vacate, and for the Appeals Court to find no abuse of discretion in such denial, were actions so clearly at odds with controlling precedent that they amounted to use of local law to deny the Porters their rights under federal credit and banking law. *See N.A.A.C.P.*, 377 U.S. at 297.

B. The State Court's Repeated Deprivation Of The Porters' Rights To Present Their Case And Be Heard In Support Of Their Claims Was So Fundamentally Unfair That It Amounted To A Denial Of Due Process And Resulted In A Manifestly Unjust And Unconscionable Judgment.

The Due Process Clause of the Fourteenth Amendment is violated when a deprivation of property is "accomplished by the state judiciary in the course of construing an otherwise valid state [law]." *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680 (1930). In such circumstances, this Court's "concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, – whether it has had the opportunity to present its case and be heard in its support." *Id.* "But while it

is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded him some real opportunity to protect it." *Id.*, 281 U.S. at 681. This is precisely what occurred in this case.

The Porters were not only deprived of the opportunity to present their claims under federal credit and banking law, but were also denied the opportunity to be heard on their state law claims through misapplication of controlling procedural rules and precedent.

Summary Judgment Proceedings

In granting summary judgment to the Bank on its counterclaims and in denying the Porters' cross-motion for summary judgment the Superior Court was so clearly confused in its rulings and application of law that no meaningful review by any subsequent court was possible.

Two days prior to oral argument, the Porters filed a supplemental memorandum in opposition to the Bank's motion for summary judgment and additional affidavits under Mass. R. Civ. P. 56(c). They also timely filed a cross-motion for summary judgment, Mass. R. Civ. P. 56(b), arguing, among other things, that the promissory notes and Guaranty on which the Bank sought summary judgment were illegal and unenforceable by their terms under the ECOA and BHCA.

The day after the summary judgment hearing, the Bank moved to strike the Porter's cross-motion for summary judgment. In its summary judgment decision of April 1993, the Superior Court ruled on Porters' Motion for Summary Judgment, this despite having *purportedly* allowed the Bank's "motion to strike" in November 1992.

In affirming the Superior Court's decision granting summary judgment to the Bank on its counterclaim, the Appeals Court inexplicably relied on the Bank's self-serving, inaccurate and unsupported assertion that the affidavits had been properly stricken. (Pet. 4a) That the Court did so where there was no docket entry, where the Superior Court's summary judgment memorandum clearly established that it had considered the supposedly stricken affidavits, and where the law clearly gave the Porters the right to submit affidavits up to the day before the summary judgment hearing, *see Dinwiddie v. Brown*, 230 F.2d 465, 468 (5th Cir.), *cert. denied*, 351 U.S. 971 (1956), clearly demonstrates the lengths to which the Court appeared willing to go to avoid ruling favorably on the Porter's appeal from the summary judgment decision.

The Superior Court acknowledged in its decision that a material issue of fact existed which precluded summary judgment in favor of the Porters on their affirmative claim of fraud in the inducement[6] but did not preclude summary judgment in favor of the Bank on their counterclaim to which fraud in the inducement was an absolute defense. In doing so, it improperly held the Porters to the standard of proof at trial. In affirming, the Appeals Court completely ignored the inconsistency and misapplication of the trial standard of proof. This provides further evidence of a fundamental denial to the Porters of their opportunity to be heard.

The Superior Court's summary judgment decision shaped and guided the conduct of the litigation from that point forward, at great prejudice to the Porters. Liability had been established in favor of the Bank on its counterclaims, irrespective of the Porters' valid and timely pled affirmative defenses. Such prejudice amounted to a gross perversion of the legal process

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6. The Court's summary judgment memorandum ignores Porters' claims that the loan documents are illegal and void by their terms, in violation of the provisions of the ECOA.

and a due process violation so significant as to represent a Fourteenth Amendment violation.

Lack of Rulings And Findings On Claims Reserved For Decision By The Court

The Superior Court's failure to make findings of fact and rulings of law on the Porters' claims under Chapter 93A, coupled with the Appeals Court's refusal to apply controlling precedent requiring remand in the circumstances of this case, effectively deprived the Porters of a hearing on the merits of their Chapter 93A claim. Standing alone, such decisions constitute a fundamental denial of due process.

The Appeals Court's decision was based on two clearly erroneous findings: (a) that "*[o]n this record*, . . . the Porters' 93A claims were based *only* on various claims of misrepresentation and fraud that were submitted to the jury," and (b) that the jury, in response to special questions, "expressly found that the defendants *had made no misrepresentations to the Porters* . . ." (Pet. 2a).

The Porters' claims under Chapter 93A were distinct and separate from the common law fraud claim submitted to the jury, including assertions that:

(a) the subordination agreement between FSB and FSBDC was unfair and violated FSBDC's duty of utmost good faith and loyalty to Mr. Porter as its partner;

(b) the terms of the $550K Note and Guaranty were unfair, oppressive and unconscionable; and

(c) FSBDC used the $550K Note to improperly and unfairly interfere with Mr. Porter's management of the partnership to the detriment of the Porters and the Partnership by forcing

> Mr. Porter to build three houses simultaneously instead of one, and unilaterally paying itself interest from the Partnership's accounts.

Because the subordination agreement was never discussed with the Porters, its terms could not possibly have been misrepresented. Thus, such claim could not have been encompassed within the fraud claim submitted to the jury. Even the Bank's counsel conceded during the charge conference that the claim that the subordination was unfair and deceptive was for the Superior Court to decide under Chapter 93A.

Likewise, the parties and the Superior Court correctly recognized that whether provisions of the credit documents were unconscionable were issues reserved for the court under Chapter 93A.[7]

Finally, the Porters claimed that FSBDC's interference with the management of the Partnership pursuant to terms of the $550K Note was unfair, *not* that such conduct was deceptive. As a result, the claim could not possibly have been encompassed by the jury's verdict.

It is thus undisputed that *none* of the three claims enumerated above were submitted to the jury, nor could they have been. The Superior Court's inexplicable failure to make findings and rulings on such claims at the same time it told the parties that it was reserving them for its consideration, and the Appeals Court's cavalier dismissal of the Porters' argument stand as additional examples of the way the Massachusetts courts

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7. The Appeals Court's decision that federal credit law claims were "not properly part of the case" improperly immunized the Bank from *any* liability under Chapter 93A in connection with the execution of the credit documents. That the Superior Court precluded the Porters from arguing a *per* se violation of Chapter 93A under 940 C.F.R. § 3.16(4) should not excuse consideration of whether the Bank's conduct was unfair and deceptive under 940 C.F.R. § 3.16(1), which makes any act or practice a violation of Chapter 93A if "it is oppressive or otherwise unconscionable."

abrogated the Porters' due process rights. *See Brinkerhoff-Faris*, 281 U.S. at 679 (state court's denial to plaintiff of only remedy ever available for enforcement of its right to prevent seizure of its property constituted denial of due process).

The Appeals Court also erred in concluding that the jury "expressly found that the defendants had made no misrepresentations to the Porters." The jury decided the Porters' fraudulent misrepresentation claim in response to a single special question combining all the non-damage elements of such claim. The Superior Court instructed the jury that to prove fraudulent misrepresentation a plaintiff must not only establish that the defendant made a misrepresentation, but that the plaintiff relied upon the representation. Reliance is *not* an element of a claim for "deception" under Chapter 93A. *See, e.g., Dalis v. Buyer Advertising, Inc.*, 418 Mass. 220, 225 (1994), *citing Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 703 (1975).

The special verdict question did not differentiate between the various elements of fraudulent misrepresentation. The Superior Court therefore had no way to determine the basis for the jury's decision. Thus neither the Superior Court nor the Appeals Court was free to use the jury's finding on the fraudulent misrepresentation claim as a basis for rejecting the Porters' Chapter 93A claim. That they did so was a denial of due process because it deprived the Porters of any real opportunity to be heard on the merits of their consumer protection claims.

The Superior Court failed to exercise its "independent duty" under Mass. R. Civ. P. 52(a) to "articulate the essential grounds for h[er] decision," *Schrottman v. Barnicle*, 386 Mass. R. 627, 638 (1982), and failed to make the "*detailed* findings of fact" required for Chapter 93A claims. *Montanez v. Bagg*, 24 Mass. App. Ct. 954, 955 (1987) (emphasis supplied).[8] The purpose of

8. Even if the Porters did not fully articulate every possible basis for liability under Chapter 93A in requests for findings, the trial "judge's responsibilities under Rule 52(a) extend beyond the parties' specific requests for findings." *Schrottman*, 386 Mass. at 639-640.

Rule 52(a) is "to ensure that the judge 'may be satisfied that [s]he has dealt fully and properly with all the issues' and that 'the parties involved and this court on appeal may be fully informed as to the bases of h[er] decision.'" *Schrottman*, 386 Mass. at 639, *quoting Markell v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass. App. Ct. 412, 416 (1980). Those purposes were clearly not met here.

Remand is *mandated* under the plain language of Rule 52(a) and by cases such as *Schrottman*, where the Massachusetts Supreme Judicial Court reversed and remanded for failure by the trial court to identify the standard of liability he applied or to make any findings on plaintiff's claim.

For the Appeals Court to conclude otherwise cannot be squared with controlling precedent and deprived the Porters not only of a decision on the merits of their Chapter 93A claim but meaningful appellate review in violation of their due process rights.

CONCLUSION

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts, individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society.

Boddie v. Connecticut, 401 U.S. 371, at 374 (1971).

> It is to Courts . . . that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through the years of adjudication put flesh upon the due process principle.

Id. at 375.

Although the Porters appear before this Court as individuals, they appear on behalf of all litigants asking nothing more than for their fair day in Court . . . a chance to be heard . . . a fair opportunity to have a jury of their peers tell them. . . "You were right" . . . OR . . . "You were wrong". They were and remain willing to accept either judgment and deal with the consequences. They are not willing to accept the continued and continuing violations of their due process rights.

As the Court in *Boddie* eloquently states, it is our system of rights to due process that elevates us above the chaotic "state of nature". We must be mindful that even the smallest fracture in that massive and well constructed legal foundation could be evidence of a significant and expanding problem.

In this action, the Courts of the Commonwealth have exposed a serious fracture. The Porters cannot explain how . . .

nor can they explain why . . . nor is it their obligation or right to do either. What the Porters can state without qualification is that the Massachusetts Judicial System has failed them, itself, and consequently all of our society. This Petition is not about one family, it is about all citizens of the Commonwealth who need the strength of a just legal system to protect us -- a legal system that may be relied upon to do its work in the light of day, exposed for all to see.

The Porters began their thirteen year ordeal with a firm belief that justice is a right to which all citizens are entitled -- an inalienable right that no one person or group of persons could abridge. They know now that such is not the case. They have learned that justice needs to be respected, cherished, and at times . . . fought for. They have invested thirteen years in that fight, against what often appeared to be insurmountable odds, but kept on, never losing faith in the ultimate rule of law. This is it . . . this Court is the Porters' ("our") last chance, and we respectfully request that this Court consider this Petition in the thoughtful manner to which the Porters are entitled . . . and which they have earned.

Respectfully submitted,

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APPENDIX A — MEMORANDUM AND ORDER PURSUANT TO RULE 1:28 OF THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT ENTERED SEPTEMBER 10, 2003

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

00-P-1762

DAVID S. PORTER & another[1]

vs.

FRAMINGHAM SAVINGS BANK & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

David S. Porter and his wife, Carol Porter, appeal pro se from a "corrected final judgment" of the Superior Court entered May 4, 1994, which includes (a) an award to the defendants of $3,649,000 against David Porter and $429,500 against David Porter and his wife, Carol Porter, jointly and severally; and (b) dismissal of the plaintiffs' claims for negligence, breach of fiduciary duty, breach of contract, fraud, and violation of G. L. c. 93A.

The Porters first claim that the trial judge erred in failing to make findings of fact or rulings of law on the claim for

1. Carol Porter.

2. F.S.B. Development Corp.

violation of G. L. c. 93A before entering judgment for the defendants on that claim. Such findings and rulings are required, they assert, by Mass.R.Civ.P. 52(a), 365 Mass. 816-817 (1974). They also argue error in the failure of the judge to rule in their favor, as matter of law, on the 93A claim, based on the defendants' requiring that Carol Porter provide additional security for a loan that was already adequately secured by David Porter's assets. They also argue that judgment was inappropriate because they had adequate evidence to support their other claims under G. L. c. 93A.

As to the Porters' claim that the trial judge erred in failing to make findings of fact or rulings of law, the purpose of rule 52 (a) is to provide assurance, in jury-waived actions, that claims have been fully and fairly considered and to permit informed appellate review, *Nassralla v. Peck*, 403 Mass. 757, 760 (1989). In such cases, we often remand for further findings where none appear in the record, see *Sidney Binder, Inc. v. Jewelers Mut. Ins. Co.*, 28 Mass. App. Ct. 459, 466-467 (1990). For the reasons set forth in the bank's brief, at pages 19-24, any claims of violation of c. 93A based on the defendant's violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1961 et seq., Regulation B, 12 C.F.R. § 202.1 et seq., and the anti-tying provisions of the Bank Holding Company Act, 12 U.S.C. § 1972(1)(C) and (D), were correctly ruled to be not properly part of the case, either as independent causes of action or as support for the 93A claims. On this record, therefore, the Porters' 93A claim was based only on various claims of misrepresentation and fraud that were submitted to the jury. In response to special questions, the jury expressly found that the Porters failed to prove that the defendants had made any fraudulent representations to them. As the jury expressly

found that the defendants had made no misrepresentations to the Porters, and their Federal claims were not part of the case, the judge correctly ruled that the Porters were not entitled to a judgment under 93A.

The Porters next claim that the judge erred in granting summary judgment to the defendants on counts I, II, and III of the counterclaim. They argue that the judge applied the wrong legal standard and that their affidavits were sufficient to raise as factual issues whether the bank had obtained the note, the guarantees, and the mortgage by fraud. Summary judgment is appropriate if there is no genuine issue of material fact and if, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as matter of law. See Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974); *Gray v. Giroux*, 49 Mass. App. Ct. 436, 438 (2000). "[A] party moving for summary judgment in a case in which the opposing party [has] the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass.R.Civ.P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716, (1991).

When the claim is on a promissory note, production of the note by the holder and establishing the genuineness of the signature sets out a prima facie case; the burden is then on the maker to establish potential defenses by sufficient affidavit. See *Coupounas v. Madden*, 401 Mass. 125, 129 (1987); *Guiness Import Co. v. DeStefano*, 25 Mass. App. Ct. 366, 366, S.C., 402 Mass. 1101 (1988). Here, the bank

produced the note, and the Porters admitted that the signatures were genuine, leaving the Porters to establish by allegation of specific facts that they had a defense to the notes. Two of the three affidavits on which the Porters rely in this appeal were correctly stricken in the trial court, on motion of the defendants, and were not part of the summary judgment materials. As to the single affidavit that survived and was part of the summary judgment materials, the motion judge ruled it insufficient to defeat the motion for summary judgment, as it contained only generalized claims of fraud and did not adduce specific facts. We agree with the trial judge. For these reasons, and for the reasons set forth by the defendants in their brief, at pages 29-36, summary judgment was properly granted on counts I, II, and III of the counterclaim.

The Porters next claim error in the denial of their motion to amend their complaint. A motion to amend lies within the sound discretion of the judge. While we recognize that "leave should be granted unless there are good reasons for denying the motion," *Mathis v. Massachusetts Elec. Co.*, 409 Mass. 256, 264 (1991), we think that it was well within the motion judge's discretion, on the facts here present, to find that there was undue delay, that there would be undue prejudice to the opposing party, and that trial was imminent. See *Mathis*, at 264. Contrast *Goulet v. Whitin Mach. Works, Inc.*, 399 Mass. 547, 552 (1987). For these reasons, and for the reasons set forth in the defendants' brief at pages 36-41, there was no abuse of discretion in the denial of this motion.

Appendix A

The Porters also claim error in the refusal of the motion judge to vacate the joint pretrial memorandum. Whether to vacate pretrial memoranda "has to do with the management of the case, and, as such, is committed to the sound discretion of the [motion] judge." *Greenleaf v. Massachusetts Bay Transp. Authy.*, 22 Mass. App. Ct. 426, 429 (1986). For the reasons set forth in the defendants' brief at pages 42-47, we see no abuse of discretion in the denial of the motion.

Finally, the Porters claim that the entire proceedings were so laden with error that substantial justice requires that there be a new trial. Evidence of manifest injustice "must be weighty and of such nature as to its credibility, potency, and pertinency to fundamental issues in the case as to be worthy of careful consideration." *Davis v. Boston Elevated Ry. Co.*, 235 Mass. 482, 495 (1920). On our review of the entire record, we see no basis for considering such relief.

Judgment affirmed.

By the Court (Armstrong, C.J., Gelinas, & Kantrowitz, JJ.),

s/ Lena M. Wong
Asst Clerk

Entered: September 10, 2003.

APPENDIX B — CORRECTED FINAL JUDGMENT OF THE COMMONWEALTH OF MASSACHUSETTS DATED APRIL 28, 1994

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 90-4263-C

DAVID S. PORTER,
CAROL ANN PORTER and
PHEASANT LANDING LIMITED PARTNERSHIP,

Plaintiffs,

vs.

FRAMINGHAM SAVINGS BANK and
F.S.B. DEVELOPMENT CORP.,

Defendants.

CORRECTED FINAL JUDGMENT

This cause came on for trial before the Court and a jury on March 14, 1994. Upon the jury's verdict returned on March 29, 1994, and upon the Court's prior rulings in this matter, judgment on plaintiffs' Verified Complaint shall and does hereby enter as follows:

1. Judgment for both defendants on Counts I and III-XI of the Verified Complaint with no costs; and

Appendix B

2. Judgment for defendant F.S.B. Development Corporation on Count II of the Verified Complaint with no costs.

Upon the jury's verdict returned on March 29, 1994, and upon the Court's prior rulings in this matter, judgment on defendants' Amended Counterclaim shall and does hereby enter as follows:

1. Judgment for the defendant (plaintiff in counterclaim) Framingham Savings Bank on Count I of the Amended Counterclaim against plaintiff (defendant in counterclaim) David S. Porter in the amount of $2,790,000 with interest and without costs;

2. Judgment for the defendant (plaintiff in counterclaim) F.S.B. Development Corporation on Count II of the Amended counterclaim against plaintiff (defendant in counterclaim) David S. Porter in the amount of $859,000 with interest and without costs;

3. Judgment for defendant (plaintiff in counterclaim) F.S.B. Development Corporation on Count III of the Amended Counterclaim against plaintiffs (defendants in counterclaim) David S. Porter and Carol Ann Porter, jointly and severally, in the amount of $429,500 with interest and without costs;

4. Count IV of the Amended Counterclaim is dismissed with prejudice;

Appendix B

5. Judgment for the plaintiff (defendant in counterclaim) David S. Porter on Counts V and VI of the Amended Counterclaim without costs.

So ordered.

s/ Judith A. Cowin
Judith A. Cowin
Justice of the Superior Court

Dated: May 9, 1994

Correcting Final Judgment
Entered on Docket 4 May 1994

Entered 5/11/93

APPENDIX C — MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THEIR COUNTERCLAIM OF THE COMMONWEALTH OF MASSACHUSETTS SUPERIOR COURT DATED APRIL 2, 1993

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. **SUPERIOR COURT**
CIVIL ACTION
No. 90-4263-C

DAVID S. PORTER, and others[1]

vs.

FRAMINGHAM SAVINGS BANK, and another[2]

The parties' dispute revolves around the purchase and development of land in Needham and the taking of loans to accomplish that objective. On May 8, 1991 the plaintiffs filed a complaint alleging unfair and deceptive trade practices pursuant to G. L. c. 93A as well as other counts relating to claims of malice, fraud, intentional infliction of emotional distress, and extortive actions prohibited by the RICO statute. Defendants counterclaimed alleging default under a

1. Carol Ann Porem and Pheasant Landing Limited Partnership.

2. F.S.B. Development Corp.

Appendix C

$2,900,000.00 note (Count I), default under a $550,000.00 note (Count II), and default under a guaranty (Count III), as well as other counts not relevant to their current motion. Before the court now is a motion by the plaintiffs for partial summary judgment on their 93A claim, and a motion by the defendant for partial summary judgment on Counts I, II, and III as set forth in their cross complaint.

FACTS

The undisputed facts as established by affidavits, verified complaints, and depositions are as follows. In order to purchase and develop certain property in Needham, Massachusetts ("Pheasant Landing property"), the plaintiff, David Porter ("Porter"), entered into an agreement with the defendant, F.S.B. Development ("FSBDC") on October 1, 1986. Porter was the general partner, and FSBDC (a wholly owned subsidiary of Framingham Savings Bank) was a limited partner. Porter, in his capacity as general partner, executed a note to Framingham Savings Bank ("FSB") in the amount of $2,011,000.00 which was secured by a first mortgage on the Pheasant Landing property. On March 17, 1987, Porter, as general partner, executed a note to FSBDC in the amount of $550,000.00 which was secured by a second mortgage on the Pheasant Landing property. On the same date, Porter and Carol Ann Porter individually executed a guaranty for up to half of the liabilities of the Partnership, and this guaranty was secured by a mortgage given to FSB on the Porters' jointly owned residence.

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Framingham Savings Bank agreed to refinance the development project. They cancelled the $2,011,000.00 note and executed a new note to Porter as general partner in the amount of $2,900,000.00. The bank subordinated its existing second mortgage on the Pheasant Landing property to a new first mortgage on the property to secure the $2,900,000.00. As a result, only the $550,000.00 note to FSBDC was then subject to Porter's and Carol Ann Porter's guaranty for half the liabilities of the partnership, i.e., $275,000.00.

When the Porters failed to repay the matured loans upon demand, and upon their failure of performance under the terms of their guaranty, FSB held a duly noticed foreclosure auction of the Pheasant Landing property pursuant to the terms of its first mortgage on that property. The bank was the high bidder on each of the four lots. The proceeds from the auction totaled $1,430,000.00.

The outstanding balance due on the $2,900,000.00 note was $2,898,618.40, so that subtracting the auction proceeds from that amount left a principal balance of $1,468,618.40. Interest and late charges through April 25, 1991 equaled $709,005.69, and collection costs, including legal fees and foreclosure expenses totaled $133,424.68 as of the date of the auction. The total deficiency (principal, interest, costs, and fees) on this note as of April 25, 1991 was $2,311,048.77.

The principal balance due on the $550,000.00 note as of the date of auction was $549,900. Interest accrued as of April 25, 1991 was $138,896.06. This, added to the outstanding principal balance, left a deficiency of $688,796.08 on April 25, 1991. The two outstanding loans combined, plus interest, costs, and legal fees totaled $2,999,844.83.

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The bank continues to hold a mortgage in the amount of $275,000.00 on the Porter's residence as security for their guaranty. Porter asserts in his memorandum in support of his motion for partial summary judgment that "[t]he Plaintiff's (sic) have been unable to sell or refinance the property because the [Framingham Savings] Bank and Bank DC continue to hold a wrongful mortgage on the property. . . ." This is an unsworn statement which the court may not construe as an undisputed fact, nor consider in its deliberations on the parties' motions.

DISCUSSION

A motion for summary judgment is in order and shall be granted if the moving party demonstrates that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. *Community National Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of showing that there is no genuine issue as to any material fact on every relevant issue, and that the moving party is entitled to judgment as a matter of law. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 808-809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a material fact. *Pederson v. Time Inc.*, 404 Mass. 14, 17 (1989); *Madsen v. Erwin*, 395 Mass. 715, 719 (1985). The courts, however, should not weigh the evidence, assess credibility or find facts. *Kelley v. Rossi*, 395 Mass. 659, 663 (1985). If the parties are disputing any material fact, summary judgment is improper.

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Plaintiff's Motion Pursuant to G.L. c. 93A.

The plaintiffs assert that the Framingham Savings Bank and F.S.B. Development Corp. engaged in unfair and deceptive practices by recording and then failing and refusing to discharge the mortgage on the plaintiffs' property. The plaintiffs assert further that the bank and F.S.B Development Corp. obtained the mortgage by fraud. In their affidavits, the plaintiffs state that various promises and representations were made by the defendants in order to induce them to sign documents giving a guarantee secured by a mortgage to the defendants. The defendants deny these allegations.

These conflicting assertions relate to issues of material fact and require an evidentiary hearing before the trier of fact. Accordingly, the plaintiffs' motion for partial summary judgment is denied.

Defendants' Motion on Counterclaim I, II and III

Determination of this motion is dependent upon whether certain loans were made by FSB and FSB Development Corp. to David Porter, whether David Porter and Carol Porter gave a guaranty to FSB secured by a mortgage on their residence, and whether David Porter and Carol Porter defaulted on these loans and on the guaranty.

Based on the undisputed facts as set forth above, all these events took place. FSB has produced the loan and guaranty notes in question, and neither David Porter nor Carol Porter has denied the authenticity of their signatures on the notes. "Unless specifically denied in the pleadings, each signature

on an instrument is admitted." G.L. c. 106, §3-307(1). "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the [obligor] establishes a defense." G.L. c. 106, §3-307(2). Allegations of fraud or questions concerning the integrity of the note are insufficient, however, to carry the obligor's burden of proof once a prima facie case has been made establishing the authenticity of the obligor's signature. *Courpounas v. Madden*, 401 Mass. 366, 371 (1945).

As evidenced by the signed notes, there is no question of fact that certain loans were made by FSB and FSB Development Corp. to David Porter and that David Porter and Carol Porter gave a guaranty to FSB secured by a mortgage on their residence. Furthermore, it is clearly established that David Porter and Carol Porter defaulted on their various obligations under the terms of these notes. Summary judgment is therefore appropriate as a matter of law as to Counts I, II, and III of the defendants' counterclaim.

ORDER

For the reasons stated above, plaintiffs' motion for partial summary judgment is ***DENIED.*** Defendants' motion for partial summary judgment as to Counts I, II, and III of their counterclaim is ***ALLOWED.*** Judgment shall enter accordingly.

s/ Barbara A. Dortch
Barbara A. Dortch
Justice of the Superior Court

Dated: April 2, 1993

APPENDIX D — ORDER OF THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS DENYING F.A.R. APPLICATION DATED OCTOBER 29, 2003

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS
One Beacon Street, Third Floor, Boston, Massachusetts 02108
(617) 557-1020

RE: Docket No. FAR-13673

DAVID S. PORTER & another

vs.

FRAMINGHAM SAVINGS BANK & another

Middlesex Superior Court No. MICV1990-04263
A.C. No. 2000-P-1762

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 10/29/03, the above-captioned Application for Further Appellate Review was denied. (Cowin, J., recused)

Susan Mellen, Clerk

Dated: October 29, 2003

APPENDIX E — STATUTES AND REGULATIONS INVOLVED

CHAPTER 22—TYING ARRANGEMENTS

12 U.S.C. § 1972

§ 1972. Certain tying arrangements

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

* * *

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

* * * *

Appendix E

SUBCHAPTER IV—EQUAL CREDIT OPPORTUNITY

15 U.S.C. § 1691

§ 1691. Scope of prohibition

Activities constituting discrimination

(a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

* * * *

Appendix E

Regulation B (Equal Credit Opportunity)

12 C.F.R. § 202.1

§ 202.1 Authority, scope and purpose.

(a) *Authority and scope.* This regulation is issued by the Board of Governors of the Federal Reserve System pursuant to title VII (Equal Credit Opportunity Act) of the Consumer Credit Protection Act, as amended (15 U.S.C. 1601 *et seq.*). Except as otherwise provided herein, this regulation applies to all persons who are creditors, as defined in § 202.2(1). Information collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 7100-0201.

(b) *Purpose.* The purpose of this regulation is to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from a public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The regulation prohibits creditor practices that discriminate on the basis of any of these factors. The regulation also requires creditors to notify applicants of

action taken on their applications; to report credit history in the names of both spouses on an account; to retain records of credit applications; to collect information about the applicant's race and other personal characteristics in applications for certain dwelling-related loans.

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12 C.F.R. § 202.2

§ 202.2 Definitions.

* * *

(a) *Account* means an extension of credit. When employed in relation to an account, the word use refers only to open-end credit.

* * *

(e) *Applicant* means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 202.7(d), the term includes guarantors, sureties, endorsers, and similar parties.

* * * *

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12 C.F.R. § 202.7

§ 202.7 Rules concerning extensions of credit.

(a) *Individual accounts.* A creditor shall not refuse to grant an individual account to a creditworthy applicant on the basis of sex, marital status, or any other prohibited basis.

* * *

(d) *Signature of spouse or other person—* (1) *Rule for qualified applicant.* Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

* * * *

Appendix E

940 CMR: OFFICE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS

3.16: General

Without limiting the scope of any other rule, regulation or statute, an act or practice is a violation of M.G.L. c.93A, § 2 if:

* * *

(4) It violates the Federal Trade Commission Act, the Federal Consumer Credit Protection Act or other Federal consumer protection statutes within the purview of M.G.L. c. 93A, § 2.

* * * *